KALAMAN OFFSHORE SDN BHD

v.

HOCK HUA BANK BHD

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[ORIGINATING SUMMONS NO: 24-143-1999]
4 JANUARY 2000

BANKING: *Securities for advances - Guarantee given by bank - Whether a conditional or unconditional performance bond - Whether there was supply of goods - Whether there was a proper demand - Whether basis of claim must be stated in demand - Whether demand invalid - Whether payment made by bank to beneficiary invalid*

CONTRACT: *Guarantee - Performance bond - Whether conditional or unconditional - Whether there was supply of goods - Whether there was a proper demand - Whether basis of claim must be stated in demand - Whether demand invalid - Whether payment made by bank to beneficiary invalid*

The plaintiff by an originating summons sought *inter alia* a declaration that the defendant was not legally liable to pay Petronas Dagang Bhd ('Petronas') the amount of RM90,000, and that the sum of RM96,330 paid by the plaintiff to the defendant under protest be refunded. At the request of the plaintiff, the defendant had earlier issued a bank guarantee ('the bank guarantee') in the sum of RM250,000 in favour of Petronas. Thereafter, the defendant received a notice of claim from Petronas to pay the sum of RM90,000 upon the bank guarantee. The defendant paid Petronas and demanded payment from the plaintiff. The plaintiff contended that liability under the bank guarantee had not arisen and that the defendant upon receiving the notice of claim from Petronas was under no legal obligation to pay and that payment should not have been made for the following reasons: (i) Petronas had not supplied any petroleum products to the plaintiff giving rise to the claim by Petronas, (ii) that it was expressly or impliedly stated in the bank guarantee that Petronas was to supply to the plaintiff petroleum products before any liability on the defendant was to arise; (iii) that there was no demand made by Petronas to the defendant; and (iv) that the notice of claim made by Petronas to the defendant did not specify the purpose for the payment sought.

Held:

[1] On a proper reading of the 1st paragraph of the bank guarantee, the court was of the view that it was a conditional performance bond and not an unconditional performance bond. The conditions attached to the bank guarantee were: firstly, there must be a supply of petroleum products by Petronas to the plaintiff and, secondly, the amount claimed must be to cover payment outstanding in respect of the supply of petroleum products.

[2] In addition to the beneficiary making the demand, it must also inform the defendant that it did so on the basis provided for in the performance bond itself. This interpretation gave meaning and effect to the words "being amount to cover payment outstanding inclusive of those which have may arisen prior to the issue and the effective date of this guarantee in respect of the above supply" which otherwise would be mere surplusage. It was for the beneficiary to assert clearly in the demand the condition or conditions stipulated in the performance bond.

[3] From the contents of the notice of demand, it was clear that Petronas had not asserted that there was supply of petroleum products to the plaintiff and that the claim of RM90,000 was to cover payment outstanding in respect of the supply. Hence, the notice of demand was invalid as it had not complied with the terms of the bank guarantee and, consequently, any payment made thereunder by the defendant was also invalid and ought to be returned.

[Application allowed with costs to be taxed.]

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 ***(refd)***

IE Contractors Ltd v. Lloyds Banks plc and Rafidain Bank [1990] 2 Lloyds Rep 496 ***(refd)***

Lee Wah Bank Ltd v. Chee Kong Electrical Engineering Sdn Bhd & Ors [1999] 2 CLJ 977 ***(refd)***

Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 ***(refd)***

The Brightside Mechanical and Electrical Service Group Ltd & Anor v. Standard Chartered Bank & Anor [1989] 3 MLJ 13 ***(refd)***

United Trading Corporation SA & Murray Clayton Ltd v. Allied Arab Bank Ltd & Ors [1985] 2 Lloyd's Law Reports 554 ***(refd)***

For the plaintiff - Joseph Tang; M/s Tang & Co
For the defendant - Stephen Chung; M/s Stephen, Robert & Wong

Reported by Farah Naim

JUDGMENT

By an originating summons dated 31 May 1999, the plaintiffs seek the following reliefs:

(1) A declaration of the court that on the true construction of Bank Guarantee No. SBR35-103208 dated 9 February 1998 read together with the letter of Petronas Dagangan Berhad dated 30 July 1998, the defendants were not legally liable to pay Petronas Dagangan Berhad the amount of RM90,000 or at all as claimed by the said Petronas Dagangan Berhad;

(2) That the sum of RM96,330 paid by the plaintiffs to the defendants on 9 April, 1999 under protest be refunded forthwith by the defendants to the plaintiffs;

(3) Further and other reliefs; and

(4) Costs

The application is supported by the affidavit of Thomas Hii King Hiong affirmed on 31 May 1999. The pertinent parts reads as follows:

> 5. The Defendants are licenced bankers carrying its business among other places at No. 3, Jalan Central, 96000 Sibu, Sarawak.
>
> 6. The Plaintiffs were at all material times and still are doing retail business in the product of Petronas Dagangan Berhad (hereinafter referred to as Petronas).
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> 7. On the 9th February, 1998, at the request of the Plaintiffs, the Defendants issued a Bank Guarantee No. SBR35-103208 in the sum of RM250,000.00 in favour of Petronas Dagangan Berhad of 5th Floor, Menara Faber 1, Taman Desa, Off Jalan Kelang Lama, 58700 Kuala Lumpur. A copy of the Letter of Guarantee is now produced and exhibited "TH1". The plaintiffs will at the trial refer to the Bank Guarantee for its full terms and effects.
>
> 10. On or about the beginning of August, 1998, and by letter dated the 30th July, 1998 the Defendants received a claim in writing from Petronas in the sum of RM90,000.00 in respect of the Bank Guarantee. A copy of the letter is now produced and marked "TH3".
>
> 11. On the 4th August, 1998, the Defendant by a letter to the Plaintiffs demanded the Plaintiffs the payment of RM90,000.00 being the amount claimed by Petronas and costs. By the letter, the Defendant gave the Plaintiffs till 11th August, 1998 to pay. A copy of the letter is now produced and exhibited "TH4".

13. The Plaintiffs' contend that the liability under the guarantee had not arisen and that the Defendants upon the claim of the letter of Petronas were under no legal obligation to pay the claim and that payment should not have been made by the payment for the following reasons:

    (a) That the Petronas had not supplied any petroleum product to the Plaintiffs giving rise to the claim of the Petronas.

    (b) That it was expressly or impliedly contained in the Defendants' Bank letter of guarantee exhibited "TH1" that the Petronas were to supply the Plaintiff of the Petroleum product before any liability on the Defendants is to arise.

    (c) There was no demand made by the Petronas to the Defendants.

    (d) The Letter of Claim by the Petronas to the Defendants did not specify the purpose of the payment. It was not a demand.

23. I am advised by my counsel and verily believe that under the terms of the guarantee, the Defendants liability under the circumstances to pay to Petronas the RM90,000.00 had not arisen. They should not pay to Petronas the sum of money.

24. I am advised by my counsel and verily believe that there was no legal obligation on our part to pay the Defendants the sum of RM96,330.00 but for the fact that the Plaintiffs were constrained to do so. The payment was made purely on without prejudice basis and was done to secure the release of the land title of the said land.

25. I am advised by my counsel and verily believe that in the circumstances, the Plaintiffs are entitled to have the sum of RM96,330.00 paid to the Defendants refunded to them.

An affidavit in opposition was affirmed by Ting Meng Kiek on 17 July 1999. The relevant parts read as follows:

9. On or about 7.2.1998 the Plaintiffs requested the Defendants to renew the Banker's Guarantee and to increase the value from RM200,000.00 to RM250,000.00. The Defendants as requested issued the said Banker's Guarantee in favour of Petronas. Now annexed as Exhibit "TMK-9" is a copy of the letter and as Exhibit "TMK-10" is a copy of the Banker's Guarantee dated 9.2.1998. A copy of the Banker's Guarantee was given to the Plaintiffs for their records.

10. The Banker's Guarantee dated 9.2.1998 (Exhibit TMK-10) given by the Defendants in favour of Petronas contained the following express terms:

    (a) we will pay you on demand without proof or condition up to and not exceeding RM250,000.00 only being amount to cover payment outstanding;

(b) the guarantee shall be valid and irrevocable for 1 year from 15.3.1998 to 14.3.1999; and

(c) The disbursements of the guaranteed sum shall become payable by us immediately on receipt of notice of demand given to us by Petronas Dagangan Berhad.

The Defendants shall at the hearing of this Originating Summons refer to the Banker's Guarantee for their full terms and effects.

11. Petronas by a notice of demand dated 30.7.1998 addressed to the Defendants claimed payment of the sum of RM90,000.00 against the said Banker's Guarantee with immediate effect. (See Exhibit TH-3).

12. Upon receipt of the notice of demand (TH-3) from Petronas to pay the sum of RM90,000.00 on 3.8.1998, the Defendants by a letter dated 4.8.1998 (Exhibit TH-4) requested the Plaintiffs to pay and indemnify the Defendants the said sum of RM90,000.00 on or before 11.8.1998. The Plaintiffs failed to pay and indemnify the Defendants the said sum of RM90,000.00 on or before 11.8.1998.

13. The Defendants then by a letter dated 12.8.1998 (see Exhibit TH-7) sent a Demand Draft in the sum of RM90,000.00 to settle the claim of Petronas under the Banker's Guarantee.

14. The Plaintiffs did not pay the said sum of RM90,000.00 to the Defendants despite several demands by the Defendants to the Plaintiffs. The Plaintiffs only paid the said sum of RM90,000.00 plus interests and commission to the Defendants on or about 9.3.1999.

19. Therefore, the allegations that the Plaintiffs were constrained to pay the said sum of RM96,330.00 and under protest were not correct.

20. At all material times when the Defendants paid the sum of RM90,000.00 to Petronas; the Plaintiffs had not presented any evidence to the Defendants to establish that the transactions were fraudulent. The Plaintiffs had not established the fact of fraud.

21. At all material times when the Defendants paid the sum of RM90,000.00 to Petronas, the Defendants were not aware of and did not know of any established fraudulent transactions.

22. I am advised by the Defendants' legal advisors and verily believe it to be true that the Defendants were under a contractual duty to pay Petronas in accordance to the Banker's Guarantee. The reasons given by the plaintiffs why the Defendants did not have to pay Petronas were not valid reasons.

The learned counsel for the plaintiffs submitted that the case involves the construction of a performance bond. Exhibit TH1 is a performance bond and the terms of the performance bond is contained in para. 1 of the guarantee. He submitted that the bond is a conditional bond. The condition attached to the bond is that there must be a supply of petroleum products by Petronas to the plaintiffs and no. 2 the amount claimed must be to cover payment outstanding in the above supply. A letter of demand must confirm to the strict terms and conditions as contained in the performance bond. The letter of Petronas did not assert particulars of payment as required by the performance bond. Accordingly it is not a letter of demand. And as a result the defendant should not have paid the money.

In our case the bank is not concerned to obtain evidence of the supply because it is stated that the demand is without proof or condition. This means that there is no need for the beneficiary to prove that supply had been made but they must assert in the demand letter that the supply has been made and the payment was for payment outstanding. If it is otherwise then the words in the performance bond "being amount to cover payment outstanding inclusive of those that may have arisen prior to the issue and the effective date of this guarantee in respect of the above supply" will be surplusage and meaningless and also renders the whole sentence redundant.

In support the following cases were cited.

(1) *The Brightside Mechanical and Electrical Service Group Ltd. & Anor. v. Standard Chartered Bank & Anor* [1989] 3 MLJ 13;

(2) *Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn. Bhd.* [1995] 1 CLJ 283; [1995] 1 MLJ 149;

(3) *Teknik Cekap Sdn. Bhd. v. Public Bank Bhd.* [1995] 4 CLJ 697; [1995] 3 MLJ 449;

(4) *China Airlines Ltd. v. Maltran Air Corp. Sdn. Bhd. (formerly known as Maltran Air Services Corp. Sdn. Bhd.) and Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517.

The learned counsel for the defendants in his written submission contended, *inter alia* as follows:

(1) Since the case of *IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyds Rep. 496, the courts have decided that the real issue of a performance bond or a banker's guarantee is one of contractual interpretation to discover the intention of the parties. This legal position

has been accepted as the correct law in Malaysia. See *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn. Bhd.* [1995] 1 CLJ 283 and *Teknik Cekap Sendirian Berhad v. Public Bank Berhad* [1995] 4 CLJ 697.

(2) The terms of the guarantee *inter alia* were as follows:

(a) we hereby guarantee that we will pay you on demand without proof or condition up to and not exceeding RM250,000 being amount to cover payment outstanding in respect of the above supply;

(b) this guarantee shall be valid and irrevocable for one (1) year from 15 March 1998 to 14 March 1999; and

(c) the disbursements of the guaranteed sum shall become payable by as immediately on receipt of notice of demand given to us by Petronas.

It was an on-demand guarantee, without proof or condition. The guaranteed sum became payable upon receipt of a notice of demand given by Petronas.

It was not worded to make it conditional on the simple declarations by Petronas that Petronas had supplied petroleum products to the plaintiffs or that the plaintiffs had failed to make any payment.

Petronas on 30 July 1998 had given the notice of demand (exh. TH-3). Under the terms of the Banker's Guarantee, the defendants were obliged to pay the amount claimed upon receipt of the demand. The defendants in accordance to the Banker's Guarantee had correctly paid this sum to Petronas and the defendants were therefore entitled to ask the plaintiffs to pay and indemnify the defendants.

(3) The plaintiffs has not establish fraud. The letter dated 21 July 1998 written by Messrs. Hii & Hii Advocates on behalf of the plaintiffs and annexed as exhibit X did not allege any clear fraud except that the plaintiffs did not place the order and did not receive the petroleum product and that the police was investigating the matter.

In *United Trading Corporation S.A.* and *Murray Clayton Ltd. v. Allied Arab Bank Ltd. and Others* [1985] 2 Lloyd's Law Reports 554 it was held that the evidence of fraud must be clear both as to the fact of fraud and as to the bank's knowledge.

(4) If there were any disputes between the plaintiffs and Petronas under their sale and purchase agreement, then the plaintiffs should sue and settle the matter with Petronas in a separate action. If any third party was involved or responsible then the plaintiffs should sue or join the third party in the action. This action against the defendants is misconceived. (see *Lee Wah Bank Limited v. Chee Kong Electrical Engineering Sdn. Bhd. & 4 Ors.* [1999] 2 CLJ 977; [1999] 3 AMR 2939.)

In reply the learned counsel for the plaintiff agreed that he did not pursue on the ground of fraud.

In *Teknik Cekap Sdn. Bhd. v. Public Bank Bhd.* [1995] 3 MLJ 449, His Lordship Shaik Daud JCA at pp. 455 to 456 said as follows:

> It 'involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties'. This is the unanimous view expressed in *IE Contractors Ltd v. Lloyds Bank plc and Rafidian Bank* [1990] 51 BLR 1.
>
> Much of the confusion and problems in interpreting performance bonds arose with the celebrated decision of the English Court of Appeal in *Edward Owen Engineering Ltd v. Barclays Bank International Ltd & Anor* [1978] 1 All ER 976; [1977] 3 WLR 764. In that case, Lord Denning MR having pointed out that a performance bond was similar to a letter of credit added that performance bonds are virtually promissory notes payable on demand. Since then it has been seen that performance bonds are, however, not on the same footing as letters of credit, they do not form part of the financial transactions supporting the performance of a contract. They are in fact collateral and subsidiary to a contract. In *IE Contractors Ltd v. Lloyds Bank plc* and *Rafidian Bank*, the court made a distinction between letters of credit and performance bonds and made it clear that the question of what was required to comply with a particular performance bond was one of construction of that bond. There is no doubt some performance bond must be paid merely on a demand being made, and whether this is so must depend on the wording of the bond itself. In *Kirames Sdn. Bhd. v. Federal Land Development Authority* [1991] 2 MLJ 198, the guarantee provided that the guarantor shall 'irrevocally and absolutely guarantee payment on demand without having to assign any reason whatsoever for such demand'. In the light of these clear and unambiguous wording it can be said that this is an unconditional and a pure 'on demand' bond. What is required to trigger payment in such bonds is the demand simpliciter. In *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn. Bhd.* [1995] 1 MLJ 149, the then Supreme Court on examination of the performance bond in that case held that it was a pure on demand guarantee and therefore a mere demand would trigger off the guarantees without asserting any reasons thereto. In that case the guarantor agreed to 'unconditionally and irrevocably guarantee payment ...' .
>
> In the present case, however, the bond began with the words 'If the sub-contractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay ...' (emphasis added). Now from the very wording of the bond itself it is clear and unequivocal that what would trigger off the guarantee is the sub-contractor's failure to execute the contract or commit any breach thereof. Then and only then would the liability of the guarantor arise. Therefore giving the words in the bond their plain meaning, it cannot by any stretch of imagination be said that the bond in the circumstances of this case is an unconditional bond.

Similarly in *Esal (Commodities) and Relton v. Oriental Credit and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 46, the performance bond stated 'we undertake to pay the said amount on **your** written demand in the event that the supplier fails to execute the contract in perfect performance ...' (emphasis added) the Court of Appeal held that:

> ... however in additional to the beneficiary making the demand he must also inform the bank that he did so on the basis provided for in the performance bond ...

The court there found that when making the demands the beneficiary did not assert that there was a failure to perform the contract. The court came to the conclusion that liability under the performance bond was conditional and the condition had not been complied with. The court went on to say that this interpretation not only gave meaning but also effect to the words 'in the event that the supplier fails ...' which otherwise would be mere surplusage. This decision was followed by the Court of Appeal in *IE Contractors.* In that case the performance bond stated as follows:

> We undertake to pay you, unconditionally, the said amount on demand, being your claim for damages brought about by the abovenamed principal. (emphasis added.)

In this case, it was further held that there need not be any precise word as provided for in the performance bond to be stated in the letter of demand but such a letter must at least assert in substance, the basis of the claim, which in that claim was damages for breach of contract. The proposition in the *Esal* case was followed by the Singapore High Court in *Brightside Mechanical and Engineering Services Group Ltd & Anor v. Standard Chartered Bank & Anor* [1989] 3 MLJ 13, where the court held that since the beneficiary did not in their demand notice indicate that they had made a determination (as required by the performance guarantee) but merely had a belief, the demand notice did not comply with the requirements of the performance guarantee.

The line of authorities seem to indicate that the courts adopted a strict interpretation of performance bonds and that in making demands on them the beneficiary must adhere strictly to their terms. This line of interpretation seems to me to be more sensible as it requires the beneficiary of the performance bond to state in plain terms that which they must, if honest, be prepared to assert, and may place him in peril of a charge of obtaining money by deception if later it turns out to be untrue to his knowledge. Furthermore banks, other financial institutions and perhaps insurance companies, would be left to assume that a breach of the contract had taken place. This is more so as they cannot challenge the demand. The banks are in fact not required to be told the nature of the breach or who is to be blamed for the breach. That is not the concern of the bank but it must be asserted that the demand is made as a result of a breach by the sub-contractor.

In *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn. Bhd.* [1995] 1 MLJ 149 His Lordship Peh Swee Chin FCJ (delivering the judgment of the Supreme Court) at p. 156 said:

> That the real issue of a performance bond is one of contractual interpretation was the unanimous view of three judges in the Court of Appeal in *IE Contractors Ltd v. Lloyds Bank plc and Rafidian Bank* [1990] 2 Lloyd's Rep 496 51 BLR 1. It is not our intention to write an essay on performance bonds, in the instant appeal, except to repeat that it 'involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties' – per Sir Denys Buckley in *IE Contractors* [1990] 2 Lloyd's Rep at p. 503; [1991] 51 BLR 1 at p. 15.

It seems clear from *Teknik Cekap (supra)* and *Esso Petroleum Malaysia Inc (supra)*, that in order to determine whether a performance bond is conditional or unconditional it must depend upon the terms of the bond itself.

In the instant case, it is not disputed that the bank guarantee (exh. TH1) is, in substance, a performance bond.

It is in the light of the established principles aforesaid that the bank guarantee in this case has to be construed.

The relevant parts of the said bank guarantee reads as follows:

> In consideration of you agreeing to supply petroleum products (hereinafter called "Supply") to M/s Kalaman Offshore Sdn. Bhd. of No. 11, 2nd Floor, Lorong 2, Jalan Tuanku Osman, 96000 Sibu Sarawak (name of company and address) (hereafter called "Client") we, Hock Hua Bank Berhad of No. 3, Central Road, 96000 Sibu, Sarawak (hereafter called "the Guarantor"). hereby guarantee that we will pay you on demand without proof or condition up to and not exceeding Ringgit Malaysia Two hundred and fifty thousand only (RM250,000.00) being amount to cover outstanding inclusive of those which may have arisen prior to the issue and the effective date of this Guarantee in respect of the above supply.
>
> This Guarantee shall be valid and irrevocable for one (1) year from 15-3-1998 to 14-3-1999 and binding notwithstading any change, amalgamation, reconstruction or otherwise of the Guarantor, PDB or the Client.
>
> The disbursement of the guaranteed sum shall become payable by us immediately on receipt of notice of demand given to us by PETRONAS Dagangan Bhd. Claims if any have to be made during the validity period of this Guarantee or within thirty (30) days after the expiry date of this Guarantee. Where there is no claim made during the aforesaid date, then all our liabilities and obligations on the said Guarantee shall be absolved.

In my view the words used in the bank guarantee are sufficiently clear.

On a proper reading of the 1st paragraph of the bank guarantee I am of the view that it is a conditional performance bond and not an unconditional performance bond. The conditions attached to the bank guarantee are firstly that there must be a supply of petroleum products by Petronas to the plaintiffs and secondly the amount claimed must be to cover payment outstanding in respect of the supply of petroleum products.

So I accept the submission that in addition to the beneficiary making the demand, the beneficiary must also inform the defendants that he does so on the basis provided for in the performance bond itself. This interpretation not only gives meaning and effect to the words "being amount to cover payment outstanding inclusive of those which may have arisen prior to the issue and the effective date of this guarantee in respect of the above supply" which otherwise would be mere surplusage.

In *Teknik Cekap Sdn. Bhd. v. Public Bank Bhd.* [1995] 3 MLJ 449 His Lordship Shaik Daud JCA at p. 457 said:

> Nothing in the demand mentioned either expressly or at least in substance that the sub-contractor had failed to perform the sub-contract or that it had committed a breach thereof.
>
> Having given this matter my serious consideration and applying the proposition in *Esal's* case which proposition I agree and accept, I hold that the appellant had failed to assert the very basis of the demand as required by the bond and, therefore, the letter of demand made pursuant to the performance bond in this case was invalid and consequently any payment made thereunder by PBB is also invalid and ought to returned. The learned judge, therefore, was right when he held that in the circumstances of this case, the demand made pursuant to the bond must assert the failure of the sub-contractor to execute the sub-contract before the said demand can be met and paid.

On the authority of *Teknik Cekap (supra)* it is for the beneficiary (Petronas Dagangan Berhad) to assert clearly in the demand the condition or conditions stipulated in the performance bond.

The letter of demand dated 30 July 1998 (exh. TH3) was sent by Petronas Dagangan Berhad to the defendants. The relevant part of which reads:

> **PARTIAL LIQUIDATION OF BANK GUARANTEE NO: SBR 35-103208 RM250,000.00 ISSUED ON BEHALF OF KALAMAN OFFSHORE SDN. BHD.**
>
> We hereby submit our partial claim against the above guarantee with immediate effect. Please submit your bank draft for RM90,000.00 (Ringgit Malaysia: Ninety Thousand only) made payable and addressed to:

PETRONAS Dagangan Berhad
Credit Control Department
Level 31, Tower 1, PETRONAS Twin Towers
Kuala Lumpur City Centre
50088 Kuala Lumpur
(Attention: Hj. Abdullah Ali)

Please take note that with the above liquidation of RM90,000.00 your total liability under the above BG will be reduced to RM160,000.00 (Ringgit Malaysia: One Hundred Sixty Thousand only) and its expiry date is on 14 March 1999.

From the contents of the letter of demand it is clear that Petronas Dagangan Berhad had not asserted that there was supply of petroleum products to the plaintiffs and that the claim of RM90,000 was the amount to cover payment outstanding in respect of the above supply.

As such I am of the view that the letter of demand has not complied with the terms of the bank guarantee. Therefore the letter of demand made pursuant to the bank guarantee in this case was invalid and consequently any payment made thereunder by the defendants is also invalid and ought to be returned.

In conclusion I allow the application with costs to be taxed unless agreed.